Before the JOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

AUG 1 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 98-82
and Competition Act of 1992	)	
	)	
Review of the Commission's	)	
Cable Attribution Rules	)	

COMMENTS OF CHASE CAPITAL PARTNERS

Chase Capital Partners ("Chase") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter (the "Notice").[1]

I. INTRODUCTION

Chase, an affiliate of The Chase Manhattan Bank, is a general partnership that provides financing, including growth equity and venture capital, for a variety of business ventures, some of which are media and telecommunications companies. Among these are broadcasters and MVPDs such as cable operators and cable-alternatives such as MMDS. The current cable attribution rules limit the ownership interests of institutional investors such as Chase to very small percentages, regardless of whether and to what degree those investors enjoy actual control over the companies in which they invest. As the Commission itself has observed,

1 FCC 98-112, released June 26, 1998.

these arbitrarily small numerical caps needlessly reduce the amount of capital available to fledgling cable competitors and established cable operators alike.

The current attribution rules were intended to promote diversity and competition, but, because they effectively block access to capital that would otherwise be available, they are in fact inimical to these objectives. Moreover, the principal concerns underlying the rules, that an investor who controls no more than five percent each of a cable operator and an alternative service provider might have both the incentive and the power to cause the alternative provider to take actions contrary to its interests, are misplaced. Institutional investors such as Chase do not commit capital for minority interests as a means to hamstring businesses in which they invest, but rather to obtain returns on those investments. More importantly, even if such protections were warranted, a five-percent ownership limit is simply much lower than necessary, and the "more restrictive standard" of the cable/MDS and cable/SMATV attribution rules is extreme overkill.

The Commission should amend the cable attribution rules by: (i) raising the limit for cognizable ownership interests from five percent of voting equity to at least ten percent; (ii) expanding the rule pertaining to investment companies to include non-passive institutional investors such as Chase; (iii) adding insulated LLC interest-holders to the insulated-limited-partner exception to the cable attribution standard; and (iv) extending the insulation exception to the cable/MDS and other contexts.[2]

---

2 Chase's comments here pertain only to attribution standards for purposes of ownership by institutional investors, and Chase does not address the standards applied with respect to behavioral restraints such as program access or program carriage. Chase recognizes that different policy considerations may apply to these restrictions involving behavioral restraints.

II. DISCUSSION

A. The Availability to Institutional Investors of Non-Controlling, Minority Interests In Cable and Cable Alternatives Is Key to Attracting Capital to the MVPD Market.

Effective competition in the market for consumer video services depends on the introduction of new products into markets often populated by established services and service providers, and the steady improvement of delivery technologies and service offerings once in place. Without significant infusion of capital, both up-front and at each milestone in system deployment and development, alternative services may never be enjoyed by the public, or may fail to reach critical mass necessary for sustained operation. Funds also are needed for improvement of physical plants and expansion of services available to subscribers of established services, such as cable. The pace of technological advance is gaining momentum, and the need for capital to bring new technologies to market more pressing than ever before.[3]

As currently formulated, the Commission's cable attribution rules stand between companies seeking to provide video services to the public and the capital they so desperately need. The Commission has acknowledged that strict ownership limits may unduly restrict investment, stating, with regard to the 5 percent cap in the broadcast attribution rules, that a "higher level of nonattributable investment may well attract new sources of capital . . . and would inevitably create greater flexibility for existing investors to increase their participation . . . ."[4] The Commission's proposal in 1992 to raise the 5 percent broadcast attribution benchmark was

---

3 *See, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, FCC 97-423, at ¶¶ 171-77 (January 13, 1998) (discussing new video delivery technologies).

4 *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd. 2654, 2655 (April 1, 1992) (*"Broadcast Investment").*

based on changes in competitive and market conditions up to that time.[5] The changes observed in 1992 are far more pronounced today.

Chase exemplifies the institutional investor that provides much-needed capital to a variety of video delivery services--the type of investor whose participation in new and existing service markets may be unnecessarily limited by the cable attribution rules. For example, Chase, through its affiliates, owns an attributable interest in Mediacom LLC ("Mediacom"), which provides franchise cable services in multiple markets. Chase also holds an attributable interest in Wireless One, Inc., which holds licenses to provide wireless cable services in numerous markets. In order for Chase to provide capital to Mediacom (representing less than 10 percent of the company's total equity), Mediacom was required to obtain a twelve-month forbearance of the Commission's cable/MDS attribution standard,[6] and indeed unless these overly-restrictive rules are relaxed, Chase or Mediacom will be forced to restructure or divest in order to come into compliance.

The degree of participation sought by an institutional investor varies depending on several factors, and an investment that represents an extremely small fraction of total equity may simply be too small for some investors. Moreover, while Chase's role in Mediacom is effectively passive, the degree of involvement by an institutional investor may vary, without necessarily posing a threat to competition. Chase does not actively participate in producing or delivering the products or services of the companies in which it invests and does not supply executives or employees to those companies, but it may play a role in policy-making, as a means

---

5 *Id.*

6 47 C.F.R. § 21.912. *See* Letter from Roy J. Stewart to Stuart F. Feldstein (January 16, 1998).

to oversee and protect its investments. For example, along with voting rights in the company, Chase often has the right to name a member of the board of directors or comparable decision-making body. Such rights do not amount to anything close to ultimate control of company decisions, and do not involve day-to-day issues of budget, personnel, or operations, but rather serve to help reduce risk to the investment. Failure to permit such involvement by institutional investors limits the availability of capital, while allowing such involvement in no way diminishes the ability of video companies to compete.

B. Minority, Institutional Investors In Competing Video Service Providers Do Not Have the Incentive Or the Ability to Inhibit Competition.

Entities that provide financing to businesses in which they themselves do not directly participate are unlikely candidates to cause harm to those businesses. Entities such as Chase are in business to obtain the best return on each investment, and are responsible to their own investors for the success of each enterprise. More importantly, even if an institutional investor were motivated to seek to cause one competitor to behave contrary to its business interests, it is difficult to imagine how such a nefarious design could be realized, unless that investor exercised actual control over one or the other competitor. As the attribution rules recognize, the most effective safeguard against behavior intended to diminish competition is to ensure that *control* of either competitor remains in the hands of those who do not also have attributable interests in the other.[7] Outside investors can then provide capital in exchange for

---

[7] *See* 47 C.F.R. § 76.501 n.2(b) (making minority interests non-cognizable so long as a single shareholder holds more than 50 percent of voting interests). Presence of actual control is also the standard often applied in practice to questions of alien ownership of regulated entities. *See Foreign Participation in the U.S. Telecommunications Market*, Report and Order on Reconsideration, FCC 97-398 (November 26, 1997) at ¶ 114 (the Commission "expect[s] that in the future most applicants will seek authorization to accept indirect foreign investments up to any non-controlling level . . . .").

minority positions without any real threat that they could cause the controlling interest-holders to act contrary to the interests of their companies.

The increasing pressure for new capital formation to support emerging video delivery systems and technology upgrades far outweighs the very low risk that a minority shareholder such as Chase would, or could, force actions by any company that are in conflict with the objectives of increasing competition and diversity. In any event, a five percent equity stake hardly represents anything close to that sufficient to force a company's management to act in ways it otherwise would not. At the very least, the ownership percentage to be treated as cognizable for purposes of the cable cross-ownership rules should be raised to ten percent, if not more. The Commission has proposed just such a change in the rules governing attribution of interests in broadcasters.[8] More realistically, the Commission should permit, without attribution, *any* non-controlling interest by an institutional investor such as Chase.

The Commission's rules contain other examples of cross-ownership caps used, as they are here, as a check on the ability to suppress competing services, where greater than five percent participation does not raise sufficient concern to deny service providers access to capital. For example, an LEC may own up to 10 percent of a co-located cable operator without restriction, and vice versa.[9] Similarly, an incumbent LEC or cable operator, or any interest-holder therein, may own up to 20 percent of an LMDS licensee that shares the same service

---

8 *See Broadcast Investment* at ¶ 9.

9 47 C.F.R. § 76.505(a), (b). Moreover, these limits apply to the entities most likely to be among the actual competitors in relevant service markets, the LECs and cable companies and their affiliates--the *operating* investors--rather than on non-operating investors such as Chase.

area.[10] An attributable interest for purposes of applying CMRS spectrum aggregation limits requires at least 20-percent ownership of competing licensees before the Commission deems control to be overly concentrated.[11] Similarly, under the Communications Act, alien investors are permitted to have up to 20 percent direct and up to 25 percent indirect ownership of domestic broadcasters and common carriers.[12] There clearly is ample precedent to support the Commission raising the cable-attribution percentage to more than five percent.

C. The Commission Should Modify the Cable Attribution Standards to Avoid Cutting Off Sources of Needed Capital.

To provide needed capital for both established and emerging video services, in view of the relatively low threat of harm to competition posed by non-operating investors with less than controlling interests in competing businesses, the Commission should amend the cable cross-ownership rules as follows:

1. Raise the ownership percentage defining cognizable interests for purposes of the cable cross-ownership restrictions, set forth in note 2(a) of Section 76.501, from five percent to at least ten percent for all investors.

2. Relax the "more restrictive attribution standard"[13] applied to cable/MDS cross-ownership in Section 24.912, by applying the same rules regarding insulation and ownership of voting versus non-voting interests that cover other types of cable cross-

---

10 47 C.F.R. § 101.1003(a), (e).

11 47 C.F.R. § 20.6(d)(2).

12 47 U.S.C. § 310(b).

13 *See* Notice at ¶ 14.

ownership.[14] Also, expand the limited-partner insulation provision to cover insulated members of limited liability companies, so long as similar insulation is certified.

3. Apply Section 76.501 note 2(c), which permits investment companies and other institutional investors to own up to 10 percent of voting equity without attribution for cross-ownership purposes, to all non-operating investors such as Chase, and increase the ownership threshold for attribution to 20 percent for such entities. Also, permit such institutional investors to control seats on the boards or comparable governing bodies of the companies in which they invest, so long as they (i) are not in control of those governing bodies, and (ii) do not directly participate in the day-to-day operations of the entities in question.

III. CONCLUSION

In view of the minimal risk of harm to the public interest caused by minority, non-operating investors such as Chase, the current cable-attribution standards are not justified for such investors. The Commission should take this opportunity to revise the standards so as to make much-needed capital more available from institutional investors.

Respectfully submitted,

By: Raymond B. Grochowski

James F. Rogers
Raymond B. Grochowski
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-2200

Dated: August 14, 1998

Counsel for Chase Capital Partners

---

14 47 C.F.R. § 76.501 notes 2(f), 2(g).